Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

United States *ex rel.* ARIC SVEN,
Petitioner,

v.

NEDRA CHANDLER, Warden,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals and the district court impermissibly heighten the standard for obtaining a certificate of appealability from the denial of Petitioner Sven's habeas corpus petition pursuant to 28 U.S.C. § 2254 ?

2. Did Sven establish a substantial deprivation of a constitutional right, such that a certificate of appealability should have been granted?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were Petitioner Aric Sven and Respondent Nedra Chandler, Warden.

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PETITION FOR A WRIT OF CERTIORARI

Aric Sven petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App. 1) is unreported. The district court's ruling on the request for a certificate of appealability (App. 2-7) is unreported. The district court's ruling on the merits of the habeas corpus petition (App. 8-26) is unreported. The Illinois Appellate Court's decision affirming Sven's conviction (App. 27-57) is reported at *People v. Sven*, 365 Ill.App.3d 226, 848 N.E.2d 228 (2nd Dist. 2006).

JURISDICTION

The court of appeals entered judgment on April 29, 2010. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONL AND STATUTORY PROVISIONS INVOLVED

Section 2253 of Title 28, United States Code, provides in relevant part:

> (c)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial

showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Petitioner Aric Sven was convicted in the Illinois state court of one count of child pornography. The charge arose out of a video recording made in a bathroom in Sven's home, wherein a teenage girl, age fifteen to sixteen, undressed and bathed with Sven's infant daughter for whom she was babysitting. The girl depicted in the video, B.S., was unaware a video recorder was operating. Two cameras were placed in the bathroom, one approximately four feet above the floor and recording straight across the room; the other camera was approximately seven feet above the floor and pointed downward. The cameras had no ability to pan, zoom, or otherwise change the perspective from which they filmed.

The sole issue raised in the Illinois trial court was whether the video depicted a "lewd exhibition of the genitals" in violation of Illinois law, or whether the images were asexual, protected speech under the First Amendment to the United States Constitution.[1] The trial court reviewed the video in the context of *United States v. Dost*, 636 F.Supp. 828 (S.D.Cal. 1986), which set forth six factors for ascertaining whether an image depicted child pornography. Based on the *Dost* factors, the trial court concluded

[1] Sven conceded that his conduct constituted a violation of a separate Illinois misdemeanor statute prohibiting unlawful videotaping, but contested that the recording depicted anything more than mere nudity.

that the video depicted child pornography because: (1) at one point during the recording, B.S. walked near the camera such that only the lower portion of her body could be seen; (2) it was unnatural for a teenager to bathe with a baby not her own; (3) B.S. was naked; and, (4) the video would likely arouse a pedophile viewer. Sven was subsequently sentenced to eight years in the custody of the Illinois Department of Corrections.

On appeal, the Illinois Appellate Court analyzed Sven's conviction under *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348 (1982), and likewise concluded that the video depicted child pornography after consideration of the *Dost* factors. More specifically, the appellate court concluded that the video depicted child pornography because at times B.S.'s genitals were visible, she was nude, and the video was filmed from the perspective of a voyeur, thereby sexualizing the content. *Sven*, 365 Ill.App.3d at 233, 236. (App. 36, 48-50) Discretionary review by the Illinois Supreme Court was declined.

After his conviction was affirmed in the Illinois state courts, Sven filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Northern District of Illinois. Sven argued that the Illinois courts had unreasonably applied this Court's decision in *Ferber*, by convicting him in violation of the First Amendment based on a video that depicted mere nudity without any sexual conduct. As well, Sven argued that the Illinois courts had made an objectively unreasonable determination of the facts

in concluding that th video depicted child pornography.

The district court denied Sven's habeas petition on October 15, 2009. (App. 8) In denying the petition, the district court concluded that this Court has not set forth a test for determining whether an image is lewd. The district court, therefore, determined that the issue it must address was not whether the video depicted sexual conduct, but rather whether the Illinois court incorrectly found that the video depicted more than mere nudity. (App. 20) According to the district court, because the video was of an "unsuspecting teenage girl removing her clothes and bathing, often with a close-up of the lower half of her body, taken from the perspective of a leering peeping tom", the video was not merely innocuous nudity that the Supreme Court intended to protect. (App. 20)

The district court also concluded that the Illinois court did not unreasonably determine the facts by finding that the video focused on the genitalia and was designed to elicit a sexual response in the viewer. (App.) According to the district court, because the video displayed the lower half of B.S.'s body, and because the camera was located near the floor and filmed upward, the Illinois court's determination that the focus was on the genitals was not unreasonable. Likewise, the district court concluded that Sven had not rebutted the Illinois court's conclusion that the video was designed to elicit a sexual response. (App. 24-25)

In light of the district court's denial of his petition, Sven sought a certificate of appealability. Sven argued that his habeas petition presented a question of significant constitutional magnitude; *i.e.*, whether the video at issue constituted child pornography or was protected by the First Amendment. Sven argued that he had made a substantial showing of the denial of a constitutional right, and that based on this Court's precedent requiring only a threshold inquiry into the underlying merits, he had demonstrated that reasonable jurists could debate the accuracy of the resolution of his claims.

The district court denied the certificate of appealability. (App. 2) In doing so, the district court revisited the merits of the claims, and concluded that Sven could not succeed on appeal because the issues were not debatable. (App. 5-7) Notably, the district court concluded that *Ferber* did not require the depiction of sexual conduct for an image to constitute child pornography, and that state statutes which merely require a showing of something more than nudity have been upheld by this Court. In a single paragraph order, the Seventh Circuit likewise denied Sven's request for a certificate of appealability. (App. 1)

REASONS FOR GRANTING THE WRIT

The Court should grant the writ for two reasons. First, the decisions of the district court and court of appeals improperly heightened the standard for obtaining a certificate of appealability. These decisions are is in direct conflict with the precedent

of this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003), and *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595 (2000). Second, the lower courts' decisions failed to account for the significance of the issue of the denial of First Amendment protection for non-sexual depictions of nudity of a minor. If Sven cannot be permitted to appeal in a case of such constitutional magnitude, it is hard to fathom a situation in which an appeal would be granted.

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE CONFLICT BETWEEN THE RULING IN THIS CASE WITH THE DECISIONS OF THIS COURT IN SLACK V. MCDANIEL AND MILLER-EL V. COCKRELL.

Sven was denied a certificate of appealability by both the district court and the Court of Appeals. In denying the certificate, the circuit court concluded, in a four sentence order, that Sven had failed to make a substantial showing of the denial of a constitutional right. (App. 1) The district court went into much more detail, and its order makes clear that it held Sven to a standard higher than is required by the decisions of this Court. (App. 2-7)

The district court, while citing *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003), nevertheless held that Sven had not established that "reasonable jurists *would* disagree as to this Court's legal or factual conclusions or that these issues merit further appellate review." (App. 7) (Emphasis added.) But this is not the standard set forth by this

Court in *Miller-El* and *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595 (2000).

In *Slack*, this Court held that in order for a habeas petition to obtain a COA, he must make a substantial showing of the denial of a constitutional right. The substantial showing standard includes demonstrating that "reasonable jurists *could* debate whether (or, for that matter agree that) the petition should have been resolved in a different manner or that the issues were 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484, *quoting*, *Barefoot v. Estelle*, 463 U.S. 880, 893, and n. 4, 103 S.Ct. 3383 (1983). (Emphasis added.) Thus, as *Slack* makes clear, the issue is not one of whether reasonable jurists *would*, in fact, debate the correctness of the decision, but whether they *could*.

If this standard were not abundantly clear from *Slack*, this Court spelled it out in more exacting detail in *Miller-El*. As this Court held, the COA determination requires only an overview of the claims and a general assessment of their merits. *Miller-El*, 537 U.S. at 336. This is a "threshold inquiry" and courts are forbidden from conducting a full inquiry into the factual or legal bases supporting the claims. *Id.* Indeed, this Court held that "a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.*, at 337.

Miller-El further held that "[i]t is consistent with §2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner 'has already failed in that endeavor.' " *Id.*, *quoting*, *Barefoot*, 463 U.S. at 893, n. 4. Instead, what an applicant must show is only " 'something more than the absence of frivolity' or existence of mere 'good faith' on his or her part." *Id.*, at 338, *quoting*, *Barefoot*, 463 U.S. at 893. Particularly relevant to this case, this Court went on to note that "[w]e do not require petitioner to prove, before issuance of a COA, that some jurists *would* grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* (Emphasis added.)

The district court here, and concomitantly the Seventh Circuit, required Sven to establish that reasonable jurists *would* grant the petition for habeas corpus. But he was not required to meet this high standard. Sven needed only to show that reasonable jurists *could* debate the issue. Sven met that easily. Moreover, in denying his request for a COA, the district court considered the full merits of the issues, rather than conducting a mere threshold inquiry into the presence or absence of the frivolity of the issues. Indeed, the district court reiterated its previous finding that Sven had not established that the Illinois appellate court unreasonably applied this Court's decision in *Ferber*. (App.5-7) In making that determination, the district court concluded, not surprisingly, that Sven would not prevail on his

claims. As this Court made clear in *Slack* and *Miller-El*, the district court held Sven to far too high of a standard. The writ should issue so that Sven can pursue an appeal of the denial of his habeas petition.

II. THE COURT SHOULD GRANT THE WRIT BECAUSE SVEN MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

Sven made a substantial showing of the denial of a constitutional right such that he should be allowed to pursue the denial of his habeas petition on appeal to the Seventh Circuit. In short, Sven's habeas petition alleged that he was convicted of child pornography, and sentenced to eight years in prison and a lifetime of registry as a sex offender, based on non-sexual images of a nude fifteen to sixteen year old girl. Sven alleged that his conviction violated the First Amendment and the principles enunciated by this Court in *Ferber*. This was not a frivolous argument.

Each of the state courts that considered this issue, and the federal district court, came to a different conclusion as to the content of the video. While each court ultimately concluded that the video depicted child pornography, no two courts reached that conclusion based on the same analysis of the video itself. Simply put, the video is not of the sort that one instantly reaches the conclusion that it depicts child pornography.

Moreover, the district court's reasoning for denying both the habeas petition itself, and the COA request, relied on a flawed legal analysis of this Court's decision in *Osbourne v. Ohio*, 495 U.S. 103, 110 S.Ct. 1691 (1990). According to the district court, the *Osbourne* Court upheld an Ohio statute wherein no "sexual conduct" was required in order for the image to depict child pornography, requiring instead only something more than mere nudity. (App. 19) What the district court failed to understand, however, is that the Ohio statute did require sexual conduct in the form of a "lewd exhibition of the genitals" – a description this Court approved in *Ferber*. Thus, the district court's reliance on "more than mere nudity" instead of actual "sexual conduct" to uphold Sven's conviction, and to deny his COA, was legally unsound.

This Court has made clear that an image must, at a minimum, depict "sexual conduct" by a minor in order for it to be proscribed under the First Amendment. *See*, *Ferber*, 458 U.S. at 764. Indeed, the *Ferber* Court specifically held that "[h]ere the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict *sexual conduct* by children below a specified age. The category of 'sexual conduct' proscribed must also be suitably limited and described." *Id.* (Emphasis in original and added). Moreover, "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene ... retains First Amendment protection." *Id.*, at 764-65. Clearly, the square holding of *Ferber* required the image to depict sexual conduct. The district court's conclusion to the contrary, and arbitrary decision to analyze the video

for mere nudity, violated the principles enunciated in *Ferber*.

The video in this case was a security camera recording of a fifteen to sixteen year old girl getting in and out of a bathtub, and getting dressed and undressed. She was never engaged in any sexual activity, nor were her genitals displayed or made the focus of any portion of the recording. The writ should issue in this case because Sven has made a substantial showing of the denial of a constitutional right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2010

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 29, 2010

Before

WILLIAM J. BAUER, *Circuit Judge*

RICHARD A. POSNER, *Circuit Judge*

No. 09-4153

ARIC SVEN,
Petitioner-Appellant,

v.

NEDRA CHANDLER,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:07-cv-5952

Virginia M. Kendall, *Judge.*

ORDER

Aric Sven has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Virginia M. Kendall	**Sitting Judge if Other than Assigned Judge**	
CASE NUMBER	07 C 5952	**DATE**	12/30/2009
CASE TITLE	SVEN vs. CHANDLER		

DOCKET ENTRY TEXT

Petitioner's motion for a certificate of appealability is denied.

■ [For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

On November 13, 2009, habeas petitioner Aric Sven ("Sven") filed a notice of appeal from this Court's October 15, 2009 Order denying his petition for writ of habeas corpus. Sven now seeks a Certificate of Appealability ("COA") pursuant to 28 U.S.C. § 2253©. For the reasons set forth below, this Court denies Sven's request for a Certificate of Appealability because he has failed to show that reasonable jurors would disagree with this Court's resolution of his original claims.

A Circuit Court in Lake County, Illinois convicted Sven of one count of child pornography on January 19, 2005. Sven produced the videotapes at issue by mounting two hidden cameras in his home bathroom and using those cameras to record his daughter's teenage babysitter, unclothed, bathing his infant daughter. Sven's habeas petition before this Court argued that his conviction resulted from an unreasonable application of First Amendment law and unreasonable determination of the facts in his case. This Court denied Sven's habeas petition on both grounds. With respect to his First Amendment argument, this Court analyzed whether the Illinois Appellate Court, as the last state court to rule on the merits of the issue, reasonably applied clearly established federal law in finding that the videos at issue did not constitute mere nudity and could be proscribed. The Court concluded that the Appellate Court's decision did not amount to an unreasonable application of clearly established federal law. Regarding Sven's second argument that the state courts' factual determinations were objectively unreasonable, this Court found that Sven failed to produce clear and convincing evidence that would rebut the presumption in favor of the Appellate Court's factual findings.

In cases where a district court rejects a habeas petitioner's constitutional claim on the merits, a COA may issue only if the petitioner demonstrates that "jurists of reasons could disagree with the district

court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Court's analysis of whether the petitioner has made such a showing "requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* at 336. This "threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims," but rather a review of whether the petitioner presents debatable constitutional arguments. *Id.*

Sven's COA request argues that reasonable jurists could disagree with this Court's conclusions as to both his legal and factual claims. Sven first asserts that his unreasonable application of First Amendment law claim presents the purely legal question of whether an image constitutes protected speech, and that an appeal is warranted to allow the Seventh Circuit to review that legal conclusion *de novo*. As an initial matter, Sven misunderstands this Court's holding. This Court did not analyze the question of whether Sven's videos constituted child pornography or protected speech, but instead reviewed the reasonableness of the Illinois Appellate Court's application of clearly established federal law in holding that the videos presented more than "mere nudity."

Sven further argues that this Court did not correctly assess clearly established federal law because Supreme Court precedent requires that "child pornography" contain, not something beyond "mere nudity," but visual depictions of sexual conduct. In support of this contention, Sven relies solely upon the Supreme Court's decision in *New York v. Ferber,* 458 U.S. 747 (1982). In *Ferber,* the Supreme Court explained that "[h]ere the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age." *Id.* at 764. Sven argues that convicting him of child pornography on the basis of videos that did not contain explicit sexual content constituted an unreasonable application of *Ferber.*

Sven's argument fails for two reasons. First, the language upon which he relies was not the square holding of *Ferber,* and thus cannot form the foundation of an unreasonable-application-of-federal-law argument. *See Carey v. Musladin*, 549 U.S. 70, 74 (2006). Instead, *Ferber* held that a New York statute making it a crime to promote, among other things, "lewd exhibition of [a minor's] genitals," was constitutional. *Ferber,* 458 U.S. at 765. Second, since *Ferber* the Supreme Court has upheld state child pornography statutes that do not contain an explicit requirement of "sexual conduct," but mandate that something more than mere nudity be present in the materials at issue. *See, e.g., Osborne v. Ohio,* 495

U.S. 103, 113-14 (1990) (upholding an Ohio statute prohibiting "the possession of viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals").

The Illinois Appellate Court's analysis of the videos at issue fits well within these parameters. Applying a well-established multi-factor test, *see People v. Lamborn*, 708 N.E.2d 350, 354 (Ill. 1999), the court found that the videos constituted a lewd exhibition of a minor's genitals and thus could be proscribed as child pornography. Because the Appellate Court reasonably applied the Supreme Court's holding in *Ferber* and its progeny, Sven's case does not present a debatable question of federal law such that reasonable jurists could disagree with this Court's denial of Sven's habeas petition.

With regard to the second issue in Sven's COA, he points to the "varying factual determinations of the state courts and this Court" to argue that the state courts unreasonably determined as a matter of fact that the videos underlying his conviction constitute child pornography. (R. 53 at 7.) Sven argues that further review is merited because "every court to consider the issue" of whether the videos he manufactured constituted child pornography reached that conclusion "through a different analysis." (R. 53 at 7-8.) The fact that courts have reached the same conclusion through different analyses, however, does not indicate that the state courts' factual

determinations were objectively unreasonable, or that reasonable jurists could differ as to the reasonableness of this Court's determination. Moreover, contrary to Sven's implication, this Court made no factual findings of its own. Instead, the Court relied on a presumption that the findings of the state courts were correct in the absence of clear and convincing evidence to the contrary. *See Ben-Yisrayl v. Buss,* 540 F.3d 542, 546 (7th Cir. 2008). The Court recounted the Illinois Appellate Court's factual findings at length and contrasted those descriptions with Sven's "blanket assertion" that the Appellate Court had no basis for its factual findings. (R. 51 at 12-14.) Sven now argues that because portions of this Court's dicta setting forth the factual background of the case varied slightly from the Appellate Court's description of the video, he has successfully "rebutted the reasonableness of the factual determinations of the state appellate court." (R. 53 at 7.) These purported inconsistencies could not be understood by reasonable jurists to rise to the level of "clear and convincing evidence" that would undermine the presumption of correctness of the state courts' factual determinations. *See Ben-Yisrayl,* 540 F.3d at 546.

For the reasons stated above, Sven has not demonstrated that reasonable jurists would disagree as to this Court's legal or factual conclusions or that these issues merit further appellate review. This Court therefore denies Sven's request for a COA.

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Aric Sven,	)	
Plaintiff,	)	
v.	)	Case No. 07 C 5952
Nedra Chandler Warden, Dixon Correctional Center,	)	Judge Virginia M. Kendall
Defendants.	)	

MEMORANDUM OPINION AND ORDER

(Filed Oct. 15, 2009)

Petitioner Aric Sven ("Sven") was convicted of one count of child pornography in violation of 720 ILCS 5/11-20.1(a)(1)(vii) on January 19, 2005 in the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois. In addition, he pled guilty to four misdemeanor counts of unlawful videotaping. Sven now petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 arguing that his child pornography conviction resulted from an unreasonable application of *New York v. Ferber*, 458 U.S. 747 (1982) and its progeny because the videos at issue contain mere nudity rather than child pornography and that the state court made an unreasonable determination of facts in finding that the videos constituted child pornography. For the reasons stated below, Sven's petition is denied.

FACTS AND PROCEDURAL HISTORY

Sven mounted two hidden video cameras in his home bathroom – one aimed at approximately waist level and one pointing downward on the bathroom from a higher angle. Using these cameras, Sven videotaped his infant daughter's babysitter, then fourteen or fifteen years old, in the bathroom unclothed bathing the infant. Sven specifically instructed the babysitter to bathe the baby and to get into the tub with the baby for safety reasons. These videotapes are the basis for Sven's child pornography conviction, which he now challenges.

Sven was charged in Lake County, Illinois with seven counts of child pornography in violation of 720 ILCS 5/11-20.1(a)(1)(vii) and four counts of unauthorized video recording in violation of 720 ILCS 5/26-4. Sven pled guilty to all four counts of unauthorized videotaping. The State dismissed four of the child pornography counts prior to trial and Sven proceeded to a bench trial on the remaining three counts. The trial judge acquitted Sven of two of the remaining three counts at the close of the State's case but convicted Sven of the last count of child pornography.

The issue at trial was whether the videos depicted the babysitter in a pose, posture or setting involving a lewd exhibition of her genitalia. Illinois courts apply a six-factor test, originally proposed in *United States v. Dost*, 636 F.Supp. 828 (S.D.Cal. 1986), in determining whether a visual depiction of

a child constitutes the lewd exhibition of the genitals (The "*Dost* test" or "*Dost* factors"). *See People v. Lamborn,* 708 N.E.2d 350, 354 (Ill. 1999). They consider: "1) whether the focal point of the visual depiction is on the child's genitals; 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* All of these factors need not be present in order for an image to be considered a lewd exhibition of the genitals. *See Id.* at 355 *citing United States v. Villiard,* 885 F.3d 117, 122 (3rd Cir. 1989). Rather, a determination of whether an image is lewd involves analyzing the overall content of the image including the age of the child. *See Id.*

The trial court applied the *Dost* factors and in an oral decision found that: 1) although the genitals are not always the focal point of the tapes, there are multiple occasions where they are the focal point; 2) the setting was not sexually suggestive; 3) it was not natural for a naked fourteen or fifteen-year old girl to be holding a naked child, not her own; 4) the victim was completely nude; 5) it was not sure whether any of the victim's behaviors suggested sexual coyness and chose not to give the factor much weight; and

6) that the sixth factor is "an objective test based upon the subcommunity of pedophiles" and that a pedophile would be aroused by the videos in this case. As such, the trial court found that the first, third, fourth and sixth *Dost* factors were present. Sven was convicted of one count of child pornography and thereafter sentenced to eight years of imprisonment on the child pornography count to run concurrent to one year of imprisonment on the unauthorized videotaping counts. Sven has since served his prison sentence and is serving a term of supervised release in Illinois.

Sven appealed his conviction to the Illinois Appellate Court ("Appellate Court"), arguing that 1) the videotapes did not amount to child pornography because they contained only innocent, non-sexual conduct; 2) the Illinois legislature did not intend to include conduct such as Sven's under the child pornography statute because such conduct is already proscribed by the unauthorized videotaping statute; 3) the trial court erred in allowing evidence of the circumstances surrounding the production of the videotapes; and 4) Sven's eight year sentence was excessive. The Appellate Court affirmed Sven's conviction. Most notably, it conducted a *de novo* review as to whether the image at issue was lewd and therefore child pornography not protected by the First Amendment. *See People v. Sven,* 848 N.E.2d 228, 232 (Ill.App.Ct. 2006).

The Appellate Court found that three of the six *Dost* factors were present and therefore that the

videotape was lewd and qualified as child pornography within the Illinois statute. *Id.* at 240. Specifically, the Appellate Court found that portions of the video focused on the victim's genitalia (factor 1), that the victim was completely nude (factor 4) and that the depiction was intended to illicit a sexual response in the viewer (factor 6). *Id.* As to factor 6, the court found that the video was intended to illicit a sexual response because the video places the viewer in the role of a voyeur, thus sexualizing the images. *Id.* at 239. Notably, the court found that "the viewer stands in relation to the victim as would a peeping tom" and the victim does not in any way react to the cameras. *Id.* Based on these findings, the Appellate Court found that the video constituted a lewd exhibition of the genitals and thus constituted child pornography. *Id.* at 240. Also, the Appellate Court found that the trial court incorrectly relied on evidence as to how the video was produced in determining whether it was lewd but that this did not provide a basis for reversal following the Appellate Court's *de novo* review. *Id.* at 241.

Sven then filed a petition for leave to appeal ("PLA") to the Supreme Court of Illinois arguing that the Appellate Court failed to apply the proper objective standard in determining whether the images on the tapes constituted child pornography. The Illinois Supreme Court denied Sven's PLA. *See People v. Sven*, 861 N.E.2d 663 (table) (Ill. 2006). Sven did not pursue postconviction remedies in state court; instead, he filed the petition for writ of habeas corpus

in this Court on October 22, 2007. He argues that 1) the Illinois Courts' conclusions that the videos depicted child pornography amounted to an unreasonable application of federal law as set forth in *New York v. Ferber,* 458 U.S. 747; and 2) the Illinois Courts' determinations of the fact were objectively unreasonable. Sven does not raise claims related to his guilty pleas to unlawful videotaping.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), habeas relief may be granted to a person in custody pursuant to the judgment of a state court only if the decision of the state court was 1) contrary to or an unreasonable application of federal law as clearly established by the Supreme Court or 2) an unreasonable determination of the facts in light of the evidence presented in the state court. *See* 28 U.S.C. § 2254(d). The "unreasonable application" prong of AEDPA applies where a petitioner argues that a state court decision correctly identified the governing federal legal rule but unreasonably applied it to the facts of the case. *See Boss v. Pierce,* 263 F.3d 734, 739 (7th Cir. 2001) *citing Williams v. Taylor,* 529 U.S. 362, 407-08 (2000). "An unreasonable application of federal law is different from an incorrect application of federal law." *Id.* As such, a federal habeas court may not grant a petition of habeas corpus simply because it disagrees with a state court's application of clearly established federal law; rather it must find the application "so erroneous

as to be unreasonable." *Id.* Put differently, a "state court decision is reasonable if it is 'minimally consistent with the facts and circumstances of the case.'" *Schultz v. Page,* 313 F.3d 1010, 1015 (7th Cir. 2002) *quoting Schaff v. Snyder,* 190 F.3d 513, 523 (7th Cir. 1999).

In addressing whether a state court rendered a decision based on an unreasonable determination of the facts, this Court presumes that factual determinations by state courts are correct absent clear and convincing evidence to the contrary. *See Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003). The state court decision must be not only incorrect but also unreasonable. *See Ward v. Sternes,* 334 F.3d 696, 704 (7th Cir. 2003). "A state court decision that rests upon a determination of fact that lies against the clear weight of the evidence is, by definition, a decision 'so inadequately supported by the record' as to be arbitrary and therefore objectively unreasonable." *Id. quoting Hall v. Washington,* 106 F.3d 742, 749 (1997).

DISCUSSION

Procedural Default

The State argues that this Court may not consider Sven's claim that his conviction relies on an unreasonable application of *Ferber,* which it frames as Sven's First Amendment claim, because the claim has been procedurally defaulted. Specifically, the State asserts that Sven argued in state court only that the images did not satisfy the *Dost* factors as adopted by

the Illinois courts. That is, he framed his argument solely as a question of state law and as such, he did not fairly present his federal claim to state courts and it is defaulted.

Before seeking a writ of habeas corpus in federal court, a state prisoner must exhaust available state remedies thereby giving the state courts "an opportunity to pass upon and correct" violations of federal rights. *Baldwin v. Reese,* 541 U.S. 27, 29 (2004) *quoting Duncan v. Henry,* 513 U.S. 364, 365 (1995). As such, the substance of a federal habeas corpus claim must first be presented to the state courts. *See Picard v. Connor,* 404 U.S. 270, 278 (1971). To provide such an opportunity, the state prisoner must "fairly present" the claim to the appropriate state courts. *See Baldwin,* 541 U.S. at 29. When a petitioner fails to fairly present a claim in state court, he procedurally defaults the claim. *See Perruquet v. Briley,* 390 F.3d 505, 514 (7th Cir. 2004).

A petitioner fairly presents his federal claim to the state courts if he "articulates both the operative facts and controlling legal principles on which his claim is based." *Id.* at 519. The petitioner need not cite "book and verse of the federal constitution" but must alert the state courts to the federal bases for his claim. *Id. citing Picard,* 404 U.S. at 278 and *Duncan,* 513 U.S. at 365-66. In determining if the state courts were made sufficiently aware of the federal claim, this Court considers whether the petitioner: 1) relied on federal cases that engage in constitutional analysis; 2) relied on state cases which apply a

constitutional analysis on similar facts; 3) framed the claim in terms that call to mind a specific constitutional right; or 4) alleged a pattern of facts well within the mainstream of constitutional litigation. *See Id. citing Sweeney v. Carter,* 361 F.3d 327, 332 (7th Cir. 2004).

Sven discussed both state and federal law, including federal constitutional law as decided by the Supreme Court, in his brief filed with the Appellate Court. Sven began his argument relying extensively on the limitations on the definition of child pornography set by Supreme Court's decision in *New York v. Ferber* in arguing that the videos were not child pornography. He specifically cited to *Ferber* for the statement that child pornography is "a category of material outside of the protection of the First Amendment." Sven then went on to rely on both state and federal law in arguing that the videos do not constitute child pornography. As such, Sven specifically addressed the limitations the federal constitution places on the definition of child pornography and relied on constitutional law. Additionally, Sven relied extensively on *Lamborn,* 708 N.E.2d 350, an Illinois Supreme Court case which relies on federal law regarding the identification of child pornography including *Ferber.* In its opinion, the Appellate Court specifically addressed the limitations *Ferber* places on what may constitute child pornography. *See Sven,* 848 N.E.2d at 229, 235.

In his PLA to the Supreme Court of Illinois, Sven relied on *Ferber* and *Lamborn* in arguing that

constitutional limits exist on what constitutes child pornography outside of the protection of the First Amendment. Also notably, Sven specifically argued that the Appellate Court's decision "would have a chilling effect on First Amendment rights as it would leave the legality of every childish image subject to conjecture, whim and fantasy."

Therefore, Sven both relied on federal caselaw engaging in constitutional analysis as well as a cited provision of the federal constitution and specifically called the state Appellate and Supreme Courts' attention to the federal constitutional dimensions of the issue of whether his videos constituted child pornography. The state courts were given a fair opportunity to, and in the case of the appellate court did, address the federal issues that he now raises in this Court. Indeed, it was all but necessary for Sven to argue the constitutional aspects of his claims – as the appellate court stated, "in determining whether an image is lewd for the purpose of the child pornography statute, a court also necessarily is determining whether the image is not protected by the first amendment." *Id.* at 231. Therefore, this Court will consider Sven's argument that the Appellate Court's decision that his videos constituted child pornography was an unreasonable application of federal law.

Unreasonable Application of Federal Law

Sven argues that the Appellate Court unreasonably applied clearly established federal law in

finding that the videotapes constituted child pornography. In this context, "clearly established federal law" refers only to holdings, not dicta, of the United States Supreme Court as of the time of the relevant state court decision. *See Carey v. Musladin,* 549 U.S. 70, 74 (2006). As such, where the Supreme Court has not made a holding squarely addressing the question at issue, there can be no unreasonable application of federal law. *See Id.* at 77 (state court could not unreasonably apply federal law due to lack of Supreme Court holding on issue); *Wright v. Van Patten,* 552 U.S. 120 (2008) (no unreasonable application where Supreme Court had not squarely addressed nor given a clear answer regarding the relevant issue).

Under Supreme Court caselaw, the standard used to judge whether an item is "obscene" – "works which taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have any serious literary, artistic, political, or scientific value" – does not limit the states' ability to prohibit child pornography. *See Ferber,* 458 U.S. at 755, 760-61 *citing Miller v. California,* 413 U.S. 15, 24 (1973). Child pornography offenses must "be limited to works that visually depict sexually conduct by children below a specific age" and what constitutes "sexual conduct" must be "suitable limited and described." *Id.* at 764. The Supreme Court in *Ferber* upheld a New York statute describing such conduct as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation,

sado-masochistic abuse, or lewd exhibition of the genitals." *Id.* at 765-66. Similarly, in *Osborne v. Ohio,* 495 U.S. 103, 113-114 (1990) the Supreme Court upheld an Ohio statute that, as interpreted by the Ohio Supreme Court, prohibited "the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged." *Id.* at 113-114 *citing State v. Young,* 525 N.E.2d 1363, 1368 (Ohio 1988); *see also United States v. X-Citement Video, Inc.,* 513 U.S. 64, 78-79 (1994) (statute that substituted "lascivious" for "lewd" not unconstitutionally vague or overbroad). Simple depictions of nudity without more, even in cases of children, however, constitute protected expression. *See Osborne,* 495 U.S. at 113 *citing Ferber,* 458 U.S. at 765, n. 18.

Sven argues that the Appellate Court misapplied *Ferber* in finding that his videos constituted child pornography because the videos did not contain a "lewd exhibition of the genitals" but rather "mere nudity." The Supreme Court does not provide a definition of lewdness – it merely states that mere nudity cannot be proscribed, that is, "innocuous" images of unclothed children cannot be proscribed. *See Id.* at 112-114. Indeed, a precise definition or test for lewdness has not been set forth by the Supreme Court.[1]

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[1] As such, Sven's reliance on the *Dost* factors as applied in *Lamborn* for determination of whether an image is lewd is

(Continued on following page)

As such, the Appellate Court could not have unreasonably applied a Supreme Court test for lewdness. Thus, this Court must determine whether the Illinois Appellate Court reasonably applied clearly established federal law in finding that the videos at issue did not constitute mere nudity and therefore could be proscribed.[2]

The Appellate Court, applying the *Dost* test, undertook a several-factor analysis of whether the videos at issue involved a lewd exhibition of unclothed genitals. This Court's own review of the evidence confirms that it was not unreasonable for the court to find that the videos did not constitute "mere nudity." As discussed in more detail below, the videos at issue here do not involve a subject that is decidedly innocuous, rather they are videos of an unsuspecting teenage girl removing her clothes and bathing, often with a close-up of the lower half of her body, taken from the perspective of a leering peeping tom. This is not a situation which is clearly and only reasonably mere nudity that the Supreme Court intended to protect such as, for example, a parent's innocent picture of his or her baby in the bath. As such, this

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improper in this inquiry because *Dost* test is not clearly established federal law as set forth by the Supreme Court.

[2] A federal court reviewing a petition for writ of habeas corpus reviews the decision of the last state court to rule on the merits of the issue. *See Schultz*, 313 F.3d at 1015. The Illinois Appellate Court was the last state court to rule on the issue of whether the videos at issue constituted child pornography because the Illinois Supreme Court summarily denied Sven's PLA.

Court finds that the Appellate Court's decision did not amount to an unreasonable application of clearly established federal law as dictated by the Supreme Court.

Unreasonable Determination of the Facts

Sven also argues that the Appellate Court's determinations on two of the *Dost* factors and its overall decision that the videos included a lewd exhibition of the genitals and thus fell within the definition of child pornography constituted an unreasonable factual determination. Specifically, he argues that it was unreasonable for the Appellate Court to determine both that the video focused on the victim's genitalia and that it was intended to illicit a sexual response.[3] As to the first factor, Sven argues that the camera does not focus on the victim's genitals but rather that "only the area where her legs join her torso" is visible and that any footage of her genitals appears unfocused or shadowed.

As stated above, in relevant part, habeas relief will not be granted unless the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Pole v. Randolph*, 570 F.3d 922, 934 (7th Cir. 2009). With regard to a state appellate court's

[3] Sven does not dispute the Appellate Court's finding that the victim was completely nude in the videos.

determination of facts, the Court "presume[s] state factual findings to be correct, unless the petitioner rebuts the presumption by clear and convincing evidence." *Ben-Yisrayl v. Buss,* 540 F.3d 542, 546 (7th Cir. 2008) (citing 28 U.S.C. § 2254(e)(1) and *Miller-El v. Dretke,* 545 U.S. 231, 240 (2005)).

In making its factual determination that the video at issue focuses on the victim's genitals, the Illinois Appellate Court relied on the images displayed in the video itself. The video, for the most part, displays the lower half of the victim's body and the frame often focuses only on her genital area and buttocks. The camera is located near the floor and films upward. While standing in front of the camera with only the lower half of her body in the frame, the victim both undresses and dresses and stands legs apart with one leg presumably up on the counter for a prolonged period of time while she cares for the baby. After reviewing the video, the Appellate Court found that the images on the tape, by virtue of their composition, specifically directed the viewer's attention to the victim's genitals. (Resp. Ex. D at 6.) Because the Court presumes the factual findings of the state court are correct and will only overturn a state court's factual finding if clear and convincing evidence demonstrates that the finding was unreasonable, *Ben-Yisrael,* 540 F.3d at 546, the Court concludes that the Illinois Appellate Court's conclusion that the videotape focused on the victim's genitalia was not unreasonable.

Sven also argues that the Illinois Appellate Court unreasonably concluded that the video was intended to solicit a sexual response. Specifically, he argues that the Appellate Court concocted its own theory to analyze the issue, focusing on the "point of view" from which the image invites the viewer to see it, and in doing so, failed to properly consider whether the video was designed or intended to elicit a sexual response in the viewer. Sven further asserts that the video itself demonstrates that it was not designed or intended to elicit a sexual response.

As an initial matter, in challenging the Appellate Court's determination that the video was designed to illicit a sexual response, Sven is not simply challenging the Appellate Court's factual findings, he is also challenging the court's analysis and ultimate conclusion that the video was designed to illicit a sexual response. To the extent that Sven asserts the Illinois Appellate Court applied the wrong approach in reaching its conclusion that the video was designed to illicit a sexual response under *Dost*, his assertion fails because he has not set forth any evidence or argument that the Appellate court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. *See Lopez v. Thurmer*, 573 F.3d 484, 489 (7th Cir. 2009). Furthermore, even if the Illinois Appellate Court had applied the wrong methodology in deciding whether the video was designed to illicit a sexual response, it is not the court's methodology but its result that the Court

reviews to determine whether its judgment was so infirm as to require the issuance of a federal writ of habeas corpus. *See Lopez,* 573 F.3d at 493; *see also Malinowski v. Smith,* 509 F.3d 328, 339 (7th Cir. 2007) (affirming the denial of a petition for habeas corpus because "even if the [state] Court of Appeals had applied the wrong standard, the proper standard results in the same conclusion.").

To the extent that Sven challenges the factual findings of the Appellate Court, his assertion fares no better. In support of its factual finding that Sven's videos were voyeuristic and intended to solicit a sexual response, the Illinois Appellate Court provided a detailed explanation:

> Essentially, the tape places the viewer in the role of voyeur. There is no narrative or plot. The images are not a scene connected to anything else. In watching the tape, the viewer stands in relation to the victim as would a peeping tom. This point of view is reinforced by the fact that the victim does not react to the camera whatsoever. . . . [W]here, as here, the viewer is placed in the point of view of a voyeur, that the images are candid contributes to their lewdness. Because the victim does not react, the image creates a sense of covert observation that would not otherwise exist.
>
> Voyeurism is sexually motivated conduct, and it is recognized as deviant behavior. Thus, by placing the viewer in the role of voyeur, the images become sexualized.

> Moreover, they are sexualized in a way consistent with deviant behavior.
>
> [These images do not] bear any similarities with the sort of photograph a parent might take of a young child bathing. [They are] different because [they] place[ ] the viewer in the position of a voyeur rather than that of a parent observing a young child bathing. . . .

(Resp. Ex. D at 11-12.) Sven's blanket assertion that "[t]here was simply no basis for the finding that the image, by virtue of its perspective, resulted in a heightened sexuality that was not otherwise present" does not constitute clear and convincing evidence that videos were not intended to illicit a sexual response and is therefore insufficient to rebut the presumption that the Illinois Appellate Court's findings are correct.

On the whole, Sven has not produced clear and convincing evidence that would rebut the presumption in favor of the state appellate court's factual findings. Therefore, the factual findings of the Illinois Appellate Court did not constitute an unreasonable application of the facts based on the record.

CONCLUSION AND ORDER

For the reasons stated above, Sven's petition for writ of habeas corpus is denied

So ordered.

/s/ Virginia M. Kendall
Virginia M. Kendall,
United States District Judge
Northern District of Illinois

Date: October 15, 2009

No. 2-05-0393 Filed 5/3/06

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ARIC SVEN, Defendant-Appellant.	Appeal from the Circuit Court of Lake County. No. 04-CF-365 Honorable John T. Phillips, Judge, Presiding.

PRESIDING JUSTICE GROMETER delivered the opinion of the court:

Defendant, Aric Sven, was convicted of one count of child pornography (720 ILCS 5/11-20.1 (West 2002)) following a bench trial in the circuit court of Lake County. Prior to trial, defendant pleaded guilty to four counts of unlawful videotaping (720 ILCS 5/26-4 (West 2002)). He raises no issue as to these counts on appeal. He does, however, contest his conviction of child pornography, arguing that the tapes he produced do not fall within the statutory definition of child pornography. We disagree and therefore affirm. We also reject defendant's contention that his sentence of eight years' imprisonment is excessive.

Defendant produced a number of videotapes, which were recovered from his home with the consent of his wife, by virtue of placing hidden video cameras

in his bathroom. Two cameras were operating, one aimed at waist level and the other pointing down from a higher angle. The latter was hidden in the speaker of a television set that was mounted in the corner of the bathroom. The cameras did not zoom in or out, nor did they pan from side to side.

At issue here is a tape defendant recorded of his daughter's babysitter. At the time of the taping, defendant's daughter was still an infant. The babysitter was 14 or 15 years old. When defendant arranged for the babysitter to care for his daughter, he instructed her to give the baby a bath. Defendant instructed the babysitter to get into the tub with the baby, purportedly for safety reasons. The babysitter testified that she was unaware that she was being taped.

The tape shows the babysitter dressing and undressing in the bathroom. Throughout much of the video, she is nude. The babysitter is seen bathing with the baby, holding the baby, bouncing the baby in her arms, and, at one point, dancing with the baby to keep her from crying. As the trial court noted, there were two occasions where the babysitter touched her own genital area. However, as the trial court also correctly noted, this was the sort of innocent conduct in which people engage in the bathroom. The sole issue before us is whether these images constitute child pornography. We hold that they do.

The crime of child pornography is defined by section 11-20.1 of the Criminal Code of 1961 (Code)

(720 ILCS 5/11-20.1 (West 2002)), in pertinent part, as follows:

> "(a) A person commits the offense of child pornography who:
>
> (1) films, videotapes, photographs, or otherwise depicts or portrays by means of any similar visual medium or reproduction * * * any child whom he knows or reasonably should know to be under the age of 18 * * * :
>
> * * *
>
> (vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child * * * ."

Defendant contends that the videotape he made does not constitute child pornography because the images are not lewd, as required by the statute. He argues that the tape simply depicts ordinary activity in which people engage while in the bathroom.

Defining "lewd" has proven somewhat problematic for courts. In *People v. Walcher,* 162 Ill. App. 3d 455, 460 (1987), the court, quoting Black's Law Dictionary, defined "lewd" as "'[o]bscene, lustful, indecent, lascivious, lecherous.'" *Walcher,* 162 Ill. App. 3d at 460, quoting Black's Law Dictionary 817 (5th ed. 1981). These terms, while synonymous, provide little concrete guidance. Relying on definitions like these would leave courts with an I-know-it-when-I-see-it

approach, reminiscent of the United States Supreme Court's attempts to define obscenity. See *Jacobellis v. Ohio*, 378 U.S. 184, 197, 12 L. Ed. 2d 793, 803-04, 84 S. Ct. 1676, 1683 (1964) (Stewart, J., concurring). Such an approach is constitutionally infirm. It is true that child pornography enjoys no protection under the first amendment. *New York v. Ferber*, 458 U.S. 747, 764, 73 L. Ed. 2d 1113, 1127, 102 S. Ct. 3348, 3358 (1982). A definitional problem, however, does exist. In order for a court to determine whether an image is not protected, the court must first determine whether the content of the image fits within the boundaries of child pornography. As the Supreme Court phrased it in *Ferber*, "The category of [depicted] 'sexual conduct' proscribed must also be suitably limited and described." *Ferber*, 458 U.S. at 764, 73 L. Ed. 2d at 1127, 102 S. Ct. at 3358.

Strictly speaking, we are not confronted with a constitutional issue; rather, the issue before us is whether the images defendant produced are lewd within the meaning of Illinois's child pornography statute (720 ILCS 5/11-20.1 (West 2002)). However, as the Illinois Supreme Court recognized, the child pornography statute finds its genesis in the standards set forth in *Ferber*:

> "In accordance with the standards set forth in *Ferber*, a person commits the offense of child pornography in Illinois by photographing or possessing photographs of any child whom the person knows or reasonably should know to be under the age of 18 where

> such child is 'depicted or portrayed in any pose, posture or setting involving a *lewd exhibition* of the unclothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child or other person.'" (Emphasis in original.) *People v. Lamborn,* 185 Ill.2d 585, 590 (1999), quoting 720 ILCS 5/11-20.1(a)(1)(vii), (a)(6) (West 1996).

Thus, in determining whether an image is lewd for the purpose of the child pornography statute, a court also necessarily is determining whether the image is not protected by the first amendment. Constitutional proscriptions, such as *Ferber*'s requirement that the conduct proscribed is sufficiently defined (*Ferber,* 458 U.S. at 764, 73 L. Ed. 2d at 1127, 102 S. Ct. at 3358), do apply. Accordingly, a workable definition of "lewd" is required.

In *United States v. Dost,* 636 F. Supp. 828 (S.D. Cal. 1986), the United States District Court for the Southern District of California articulated a number of factors that have been widely adopted by courts assessing whether an image of a child is lewd or lascivious. See *Lamborn,* 185 Ill.2d at 592 (collecting cases). The standard has been adopted and applied in this state. *Lamborn,* 185 Ill.2d at 592; *People v. Lewis,* 305 Ill. App. 3d 665, 678 (1999). In making such determinations, the following factors are relevant:

> "(1) whether the focal point of the visual depiction is on the child's genitals; (2) whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Lamborn*, 185 Ill.2d at 592.

Not all factors need be present for an image to be deemed lewd. *Lamborn*, 185 Ill.2d at 592. Instead, the image must be judged in light of its overall content, while taking into account the age of the minor. *Lamborn*, 185 Ill.2d at 592-93. Since the overall content is relevant, the *Dost* factors are not all inclusive. Finally, simple nudity, while a factor to consider under *Dost*, is not sufficient in itself to render an image lewd. The Illinois legislature proscribed a "lewd exhibition of the unclothed genitals." 720 ILCS 5/11-20.1(a)(1)(vii) (West 2002). Equating nudity with lewdness would render the term "unclothed" meaningless, which contravenes a basic principle of statutory construction. *People v. Maggette*, 195 Ill.2d 336, 350 (2001) ("A court should construe a statute, if possible, so that no term is rendered superfluous or meaningless").

It must be emphasized that we are assessing the content of the images rather than the conduct of defendant. As our supreme court stated, "We must review the photographs themselves and determine whether those photographs are lewd under the child pornography statute." *Lamborn,* 185 Ill. 2d at 590. Later, in discussing the sixth prong of the *Dost* test, the court emphasized that "[a] determination that a photograph constitutes child pornography focuses on the photograph itself." *Lamborn,* 185 Ill. 2d at 594. Our inquiry, then, is clearly limited to the content of the videotape itself. As defendant points out in his brief, the manner of its making and other facts external to the images, though unsavory, are irrelevant for the purpose of determining whether the images are lewd. In fact, defendant's conduct surrounding the making of the tape constitutes the separate crime of unlawful videotaping (720 ILCS 5/26-4 (West 2004)).

Finally, in determining whether an image is "lewd" within the meaning of the child-pornography statute, the *de novo* standard of review applies. *Lamborn,* 185 Ill. 2d at 590. This standard has been criticized. *See Lamborn,* 185 Ill. 2d at 598 (Heiple, J., dissenting); *Lewis,* 305 Ill. App. 3d at 677. Given that the analysis focuses on the content of the images, *de novo* review makes sense. Quite simply, the trial court is in no better position to judge the content of a photographic image than we are where the image is available to us. Indeed, the principle that we conduct *de novo* review where facts are undisputed and only questions of law remain is a common one. *See, e.g.,*

City of Champaign v. Torres, 214 Ill. 2d 234, 241 (2005) ("The pertinent facts are uncontroverted. The task before us is to determine how the relevant statutory terms and constitutional principles should apply to those uncontroverted facts. Where, as here, the question on appeal is limited to application of the law to undisputed facts, the standard of review is *de novo*"); *People v. Kleutgen,* 359 Ill. App. 3d 275, 278 (2005) (DUI case); *People v. Dieppa,* 357 Ill. App. 3d 847, 849 (2005) (validity of search); *Farris v. Industrial Comm'n,* 357 Ill. App. 3d 525, 527 (2005) (wage determination under Worker's Compensation Act). Here, not only are the facts undisputed, but we are able to observe the alleged crime, that is, the images, firsthand. There is no reason to defer to the trial court's determination on this matter.

With these standards in mind, we now turn to the images at issue in this case. The first factor we must consider is "whether the focal point of the visual depiction is on the child's genitals." *Lamborn,* 185 Ill. 2d at 592. Defendant concedes that there are times where all that is seen is the babysitter's genitals. However, he points out that at other times, her entire body is visible and at still others, nothing is visible save the bathroom itself. Defendant's argument requires us to consider a preliminary question: are we to consider the tape as a whole or is it proper to focus upon particular images such that one portion of the tape may be lewd while another may not? We believe the latter approach is correct. *Ferber* provides sound guidance on this point. In that case, the

Supreme Court made the following observation: "[A] work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. It is irrelevant to the child [who has been abused] whether or not the material * * * has a literary, artistic, political or social value. [Citation]." *Ferber,* 458 U.S. at 761, 73 L. Ed. 2d at 1125, 102 S. Ct. at 3356-57. In the present case, it is similarly irrelevant that portions of the tape show nothing but the bathroom itself. The presence of such passages on the tape does not serve to dilute other portions where the babysitter appears naked. We conclude, therefore, that it is proper to consider portions of the tape individually and determine whether they, in themselves, are lewd.

Having rejected defendant's premise that the videotape should be judged in its entirety, his concession that "there are times that all that is seen on the videotapes are the minor's vagina or buttocks" becomes dispositive. Since there are times in which "the focal point of the visual depiction is on the child's genitals" (*Lamborn,* 185 Ill.2d at 592), this factor weighs in favor of finding that the images are lewd.

The next factor is "whether the setting of the visual depiction is sexually suggestive, *i.e.,* in a place or pose generally associated with sexual activity." *Lamborn,* 185 Ill. 2d at 592. It is, perhaps, debatable whether a bathroom is a place "generally associated with sexual activity." However, *Lewis* teaches that a

more substantial inquiry is necessary. In *Lewis*, this court observed the following:

> "Regarding factor two, although the setting is a bedroom, this fact is not used to suggest sexual activity. A made-up bed appears in the background without any indication that the bed has any sexual meaning in the photo." *Lewis*, 305 Ill. App. 3d at 678.

A bedroom is certainly more closely associated with sexual activity than a bathroom, yet even regarding a bedroom, the *Lewis* court considered the overall tone of the image. Applying the same analysis in this case, there is nothing sexually suggestive about the setting of the tape. While a bathroom may be associated with sexual activity in some circumstances, in this case, where the victim was bathing an infant, the "setting" is not sexually suggestive. Indeed, the State does not seriously contest this prong.

Third, we must determine "whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child." *Lamborn*, 185 Ill. 2d at 592. Defendant asserts that there is nothing unnatural about the activities that take place in the videotape. Considering the images in themselves, according to defendant, the activity depicted could simply be a young mother bathing with her infant. The State's response goes seriously awry at this point. The State argues that assuming that there was a familial relationship between the infant and the person bathing her, and further assuming that a mother would bathe with her infant, the images at

issue "are not the spontaneous type of photograph taken by parents of their young child bathing." Instead, the State continues, "they are the premeditated, secretive videotapes of a fully-developed, completely naked, 14 or 15 year old neighbor who had been duped by defendant into bathing with his daughter." Indeed, the State concludes that this is so because the images "involve[ ] a naked minor not related to the baby." The State's argument is ill-taken in that it relies on how the tape was made (which, as noted previously, constitutes a different crime) and other information extraneous to the images themselves. That the person holding the infant had been duped cannot be known from the images themselves, nor can the fact that she was a neighbor. Moreover, as defendant points out, "[n]udity is appropriate for bathing." This factor does not support a finding that the images defendant produced are pornographic, because the victim is not depicted in an unnatural pose. However, to say that the activity in which the victim engaged is natural is not the same thing as saying that the images themselves are natural. That consideration, however, is best addressed in the context of the sixth prong.

The fourth factor we must consider is "whether the child is fully or partially clothed, or nude." *Lamborn*, 185 Ill. 2d at 592. Defendant properly does not contest this factor. Accordingly, this factor favors a finding that the images defendant produced are pornographic.

The fifth factor is "whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity." *Lamborn,* 185 Ill. 2d at 592. The parties and the trial court focused upon one occurrence on the videotape where the babysitter appeared to touch the area of her vagina and then placed her finger in her mouth. On another occasion, the babysitter appeared to touch her genitals. The trial court found that though the conduct in question was innocent, it still could suggest sexual coyness and a willingness to engage in sexual activity. Our viewing of this portion of the tape reveals nothing of the sort. Indeed, this conduct was, as defendant suggests, something that people sometimes do in the bathroom. Therefore, this factor weighs against a finding that the videotape contains pornographic images.

We come, at last, to the sixth factor, "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Lamborn,* 185 Ill. 2d at 592. This factor has proven quite difficult to apply. Two problems arise: first, intended or designed by whom, and, second, who is the viewer. Both appear to conflict with the directive that "[a] determination that a photograph constitutes child pornography focuses on the photograph itself." *Lamborn,* 185 Ill. 2d at 594. The first seems to require an inquiry into a defendant's state of mind, and the second appears to focus upon the reactions of viewers of the image. These things, however, are external to the image itself.

Indeed, some courts struggling to apply the sixth factor set forth in *Dost* have virtually abandoned it. Both the First and Third Circuits of the Federal Court of Appeals have come to the following conclusion: "We believe that the sixth *Dost* factor, rather than being a separate substantive inquiry about the photographs, is useful as another way of inquiring into whether any of the other five *Dost* factors are met." *United States v. Villard,* 885 F.2d 117, 125 (3rd Cir. 1989); *see United States v. Amirault,* 173 F.3d 28, 35 (1st Cir. 1999). Indeed, this court conducted such an analysis in *Lewis,* 305 Ill. App. 3d at 678, essentially determining that the sixth factor did not indicate that the image at issue was pornographic, because the second and fifth factors did not. While treating the sixth factor in this manner poses no conceptual difficulties regarding deviating from the four corners of the image, it really adds nothing to the analysis and deprives the sixth factor of any true content. Contrary to the First and Third Circuits, we do not see how revisiting the first five factors in the guise of applying the sixth is a particularly useful exercise.

As for the first problem – intended or designed by whom – the resolution is simple enough. Given that the image must be judged on its own terms, a defendant's subjective intentions are irrelevant. Thus, the inquiry is necessarily limited to what the image itself says about itself. Put differently, only the characteristics of the image are relevant to determining whether it was created to evoke a sexual

response in the viewer. Moreover, just as a defendant's subjective intentions cannot condemn an otherwise innocent image, neither can they save an otherwise pornographic one. The image must be evaluated solely on its own terms. *Lamborn,* 185 Ill. 2d at 594.

Turning to the second problem – the identity of the viewer – our supreme court, while emphasizing that whether a defendant is aroused by an image is not relevant, held that "viewer" refers to the objective viewer. *Lamborn,* 185 Ill. 2d at 594. If one were to take that holding to require an analysis of how the average, ordinary person would react to the image, the problem of departing from the four corners of the image remains. The average person's reaction, like the subjective reaction of an individual pedophile, is something external to the image itself.

Furthermore, determining whether an image is lewd by reference to whether a sexual response would be elicited in an ordinary person (or perhaps an ordinary pedophile) creates a further problem. In *Ferber,* the Supreme Court held that "[t]he category of [depicted] 'sexual conduct' proscribed must also be suitably limited and described." *Ferber,* 458 U.S. at 764, 73 L. Ed. 2d at 1127, 102 S. Ct. at 3358. Trying to determine what response an ordinary person would have to an image invites unguided speculation and undermines the balance of the analysis set forth in *Dost.* After carefully applying the first five factors, a court would then consider the reaction of an ordinary

person without any concrete guidance whatsoever. Proceeding in this manner would run afoul of *Ferber.*

Moreover, why the reaction of an *ordinary* person is relevant to determining whether an image is *child* pornography is unclear. *Cf. People v. Spargo,* 103 Ill. App. 3d 280, 287 (1982) ("For example, if the court determines that the material is designed for the specially susceptible audience of pedophiles, must the court then determine that the material is 'patently offensive' and 'lacks serious literary, artistic, educational, political or scientific purpose or value' to the average pedophile, or must the court make those determinations with reference to the 'ordinary adult'?"). It would seem that child pornography would not elicit a sexual response in an ordinary person, as an ordinary person is not a pedophile. In the context of obscenity law, the United States Supreme Court was confronted with a similar argument:

> "Indeed, appellant's sole contention regarding the nature of the material is that some of the books involved in this prosecution, those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the average person in sex, that instead of stimulating the erotic, they disgust and sicken." *Mishkin v. New York,* 383 U.S. 502, 508, 16 L. Ed. 2d 56, 61-62, 86 S. Ct. 958, 963 (1966).

The Supreme Court rejected this argument, explaining:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group." *Mishkin,* 383 U.S. at 508, 16 L. Ed. 2d at 62, 86 S. Ct. at 963.

It cannot be that the sixth factor of the *Dost* test requires a finding that an image would elicit a sexual response in an ordinary person in order for that factor to support a finding that an image constitutes child pornography. As the Supreme Court recognized in the context of obscenity, such a standard makes no sense. Ordinary people are not sexually stimulated by child pornography.

Taking "viewer" to refer to the ordinary pedophile is not satisfactory for several reasons. One commentator recognized the following problem: "But how are we to get inside the head of the pedophile and to see the world from his eyes?" A. Adler, *Inverting the First Amendment,* 149 U. Pa. L. Rev. 921, 955 (2001). Moreover, if the criterion is whether a pedophile would find an image sexually stimulating, virtually any image of a child could be classified as child pornography. *See* 149 U. Pa. L. Rev. at 956 ("In fact, it is arguable that when viewed from the perspective of pedophiles, all children could be erotic"). Thus,

considering the objective viewer to be an ordinary pedophile creates other problems. In addition to departing from the four corners of the image and inviting unguided speculation, such a standard puts the trier of fact in the position of having to discern the mental state of a deviant group on a matter alien to the average person's understanding. It also puts numerous obviously nonpornographic images at risk of being classified as pornography.

Indeed, the reaction of the "ordinary person" or the "ordinary pedophile" cannot be what the supreme court intended when it held that the "viewer" of the sixth prong is the "*objective viewer.*" (Emphasis added and in original.) *Lamborn,* 185 Ill. 2d at 594. Either formulation conflicts with the court's holding that the image be evaluated on its own terms. Thus, the court must have meant something else.

The only plausible meaning to ascribe to the term that limits the analysis to the four corners of the image is point of view. That is, the question is whether the characteristics of the image invite the viewer to see the image from a particular perspective. "Point of view" is defined as, *inter alia,* "a particular position (as in space, time, *development*) from which something is considered or evaluated: STANDPOINT, VIEWPOINT from the *point of view* of a child, many things in the adult world are mysterious." (Emphasis added and in original.) Webster's Third New International Dictionary 1750 (2002). As the definition includes the "development" of an individual, as exemplified by the reference to the" *point of view* of a

child," it is clear that "point of view" refers to both the physical-spatial orientation of the viewer toward an object and the mental condition of the viewer insofar as it affects the way the viewer sees the object. An image may or may not invite a viewer to see an object from a particular point of view.

In the world of art, the concept is well known. One art dictionary defines the term, in relevant part, as follows: "A position or angle from which something is observed or considered, and the direction of the viewer's gaze; a standpoint which is either a physical location or one in the mind. * * * A manner of viewing things; an attitude. The attitude or outlook of a narrator or character in a piece of literature, a movie, or another art form." http://www.artlex.com/pm.html. The same source defines "attitude," as used in the above definition, as "[a] mental position (feeling or emotion) concerning a fact or a state; a state of mind; a point of view or an outlook." http://www.artlex.com/aru.html. Often, the point of view from which the viewer sees the image is a result of the characteristics of the image itself. *See* K. O'Neill, *The Ambush Interview: A False Light Invasion of Privacy?*, 34 Case W. Res. L. Rev. 72, 87 (1983) ("The interviewee's credibility may be further undermined by the effect of lighting, camera angle, camera movement, and sound recording. The 'stalking' movement of the handheld camera as it aggressively approaches the subject may contribute to viewer perception of his guilt, or the cameraman may photograph the subject from a low angle to create a 'sinister' look"). Similarly, a

photographic image might place "its viewer in an epistemically privileged position, one step removed from the eyewitness." L. Harmon, *Fishing Deep Waters: Tributes & Commentaries: The Canyon of Doubt: John William Corrington's the Risi's Wife,* 26 Legal Stud. Forum 859, 863 (2002). Moreover, images themselves establish a point of view regardless of their creator's intent. *Cf.* P. Quint, *Free Speech and Private Law in German Constitutional Theory,* 48 Md. L. Rev. 247, 300 n.173 (1989) ("Moreover, the documentary form is particularly dangerous because the film's point of view is often accepted as a representation of reality"). Quite simply, artistic images affect their viewers. *See* J. Nivala, *The Landscape Art of Daniel Urban Kiley,* 29 Wm. & Mary Envtl. L. & Pol'y Rev. 267, 322 (2005), quoting T. Joffrain, *Deriving a (Moral) Right for Creators,* 36 Tex. Int'l L.J. 735, 785 (2001) and V. Zlatarski, *"Moral" Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States,* 23 Colum. – VLA J.L. & Arts 201 (1999) ("If we accept 'the notion that "art is expression," something to "express feeling and transmit understanding" no matter the medium,' then landscape design is art – visual art. It is also public art, which 'does not merely present a collection of formal aesthetic attributes; it alters its environment, affects its viewer, and forges moral meaning'"); S. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, The Sublime, and The First Amendment,* 1987 Wis. L. Rev. 221, 256 (1987) ("Moreover, while nonrepresentational art often involves the use of forms chosen by the artist to create a certain

feeling in the viewer, these forms also reflect the artist's view of the world"). Visual art consists of images, and, while it would be a stretch to call what defendant created art in the same sense that it would be to call candid family photographs art (at least in the traditional sense), any image might place the viewer into a particular point of view.

Returning to the world of the law, a more concrete example might prove more helpful. In obscenity prosecutions, the question of whether a work has some redeeming value is a part of the analysis. *See People v. Page Books, Inc.*, 235 Ill. App. 3d 765, 773 (1992). In *City of Chicago v. Geraci*, 46 Ill.2d 576, 583 (1970), the question arose as to whether a 10-page introduction by a doctor that "purport[ed] to place the contents of an [otherwise obscene] book into some psychological perspective" vested the book with some redeeming value such that it fell within the protection of the first amendment. In essence, the defendant was arguing that the introduction altered the nature of the book because it altered the point of view from which the viewer would perceive the material. Although the supreme court ultimately rejected the defendant's argument, finding the introduction a "hollow subterfuge," it took the argument seriously. *Geraci*, 46 Ill.2d at 583-84. If, in fact, the introduction had not been simply a ruse to escape an obscenity prosecution, the material could not have been deemed obscene. This is solely because the introduction would have created an atmosphere where the reader would have been encouraged to perceive the balance of the

book from an appropriate point of view. Hence, the point of view in which a work places a viewer is a characteristic of the work itself and can change the very nature of the work.

If the sixth factor of *Dost* refers to the point of view, if any, in which the image places the viewer, the problems set forth above are largely avoided. Because the perspective of the viewer is determined from the characteristics of the image, there is no reference to matter outside of the four corners of the image. Similarly, the inquiry does not focus upon the hypothetical reaction of the average viewer or the average pedophile, which also lies outside of the image. Indeed, reaction *per se* becomes irrelevant. The inquiry does not focus upon the reaction of a viewer, objective or otherwise, having been invited to view the work from a certain point of view. It simply asks, in which point of view does the image place the viewer? This approach does not require the trier of fact to ascertain the state of mind of a pedophile. Moreover, it avoids the problem of transmuting otherwise ordinary images into child pornography simply because they might arouse a pedophile. Thus, we believe that the proper inquiry focuses upon whether the image invites the viewer to perceive the image from some sexualized or deviant point of view. *Cf. United States v. Wiegand,* 812 F.2d 1239, 1244 (9th Cir. 1987) ("[L]asciviousness is not a characteristic of the child photographed *but of the exhibition which the photographer sets up* for an audience that consists of himself or likeminded pedophiles" (emphasis added)).

As noted above, not all of the *Dost* factors need be present in order to find that an image is child pornography. *Lamborn,* 185 Ill. 2d at 592. It may turn out that in the majority of cases, this factor will have little application. However, our approach has the virtue of restoring to the sixth factor some content independent of the first five, and it confines the analysis to the four corners of the image. In certain circumstances it may prove a useful tool for evaluating a particular image. This is one such case.

In the present case, we must first remember that we are assessing images. We are not simply deciding whether a naked teenaged girl bathing a naked infant is lewd. Indeed, the conduct depicted is properly assessed under the third prong of *Dost. Lamborn,* 185 Ill. 2d at 592. Instead, we must determine whether the videotape that defendant produced is lewd. Our final inquiry to this end is whether the images invite the viewer to see the activity on the tape from some sexualized or deviant point of view. We conclude that they do.

Essentially, the tape places the viewer in the role of voyeur. There is no narrative or plot. The images are not a scene connected to anything else.[1] In

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[1] We are cognizant that, under *Ferber,* 458 U.S. at 764, 73 L. Ed. 2d at 1127, 102 S. Ct. at 3358, "the material at issue need not be considered as a whole." We do not here mean to suggest that an otherwise pornographic image could be saved by the balance of a work. However, here, we are not concerned with balancing the value of a work as a whole with a particular scene,

(Continued on following page)

watching the tape, the viewer stands in relation to the victim as would a peeping tom. This point of view is reinforced by the fact that the victim does not react to the camera whatsoever. Whether an image is candid or posed has been deemed relevant in determining whether an image is lewd. *See Villard,* 885 F.2d at 125; *Doe v. Chamberlin,* 139 F. Supp. 2d 637, 648 (M.D. Pa. 2001). Generally, as suggested by the third factor, certain poses would support a finding that an image is lewd. However, where, as here, the viewer is placed in the point of view of a voyeur, that the images are candid contributes to their lewdness. Because the victim does not react, the image creates a sense of covert observation that would not otherwise exist.

Voyeurism is sexually motivated conduct, and it is recognized as deviant behavior. *See In re Marquardt,* 100 Ill. App. 3d 741, 745 (1981) ("In addition to drug abuse, the following are classified as mental disorders in various editions of DSM sexual deviations, including homosexuality, fetishism, pedophilia, voyeurism"); *People v. Penney,* 7 Ill. App. 3d 191, 197 (1972) ("The story is replete with accounts of intercourse, rape, cunnilingus, voyeurism, fellatio, lesbianism and other abnormal sexual acts"). Thus, by placing the viewer in the role of voyeur, the images

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as in an obscenity case. We are asking whether the overall nature of the work colors the images themselves.

become sexualized. Moreover, they are sexualized in a way consistent with deviant behavior.

Here, that the point of view in which the viewer is placed leads to the conclusion that the tape is lewd can be seen by comparing it with a certain photograph at issue in *Lamborn*. In that case, the supreme court determined that the photograph was not lewd. The court explained, "This photograph is best described as capturing an uninhibited moment of adolescent spontaneity, in which two teenage girls whimsically pull off their bikini tops while swimming together." *Lamborn*, 185 Ill. 2d at 593. In other words, the photograph was of the sort that friends might take of friends. The videotape at issue here is of a totally different nature. These are not the type of image described in *Lamborn*, nor do they bear any similarities with the sort of photograph a parent might take of a young child bathing. It is different because it places the viewer in the position of a voyeur rather than that of a parent observing a young child bathing or that of a friend, as the picture suggested in *Lamborn*. Accordingly, this prong of *Dost* indicates that the images defendant created are lewd.

In sum, the first, fourth, and sixth factors all indicate that the videotape defendant produced is lewd and therefore child pornography within the meaning of section 11-20.1 (720 ILCS 5/11-20.1 (West 2002)). The victim was fully nude, the tape contained images that focused upon her genitalia, and the characteristics of the tape place the viewer in the perspective of a voyeur. Three factors, the second,

third, and fifth, militate for a different conclusion. The setting was not sexually suggestive, the victim was not depicted in an unnatural pose or attire, and the victim did not exhibit sexual coyness or a willingness to engage in sexual activity. However, given the voyeuristic nature of the videotape, the fifth factor is entitled to little weight. One simply would not expect the victim to exhibit sexual coyness or a willingness to engage in sexual activity while engaged in normal activity. The fact that she exhibited neither, under such circumstances, does not undermine the lewd nature of the videotape. Likewise, that the images were not posed does not undercut the voyeuristic nature of the images. Considering the totality of the videotape in light of the six considerations articulated in *Dost*, we conclude that the tape is lewd. Therefore, we affirm defendant's conviction.

In a related argument, defendant contends that the legislature did not intend section 11-20.1 (720 ILCS 5/11-20.1 (West 2002)) to apply to what he terms "peeping tom" cases such as this one. As evidence of this intent, he compares section 11-20.1 to new amendments to section 26-4 of the Code (720 ILCS 5/26-4 (West 2004)), which make unlawful videotaping of a minor a felony in certain circumstances, and section 11-20.2 of the Code, which imposes an obligation upon film processors to report to a peace officer photographic images of minors engaged in sexual conduct (720 ILCS 5/11-20.2 (West 2004)). Defendant claims that these statutes should be read *in pari materia* with section 11-20.1.

The principle that statutes that relate to the same subject should be read *in pari materia* is a principle of statutory construction. *See Mowen v. Holland,* 336 Ill. App. 3d 368, 374 (2003). Therefore, the rule applies only when it is necessary to resolve a statutory ambiguity. *People v. Aleman,* 355 Ill. App. 3d 619, 626 (2005). Defendant has not attempted to establish that section 11-20.1 is ambiguous in any way. Thus, absent an ambiguity, it is unnecessary for us to construe the statute.

Before concluding this portion of this opinion, we note that defendant has set forth, as a separate argument, that the trial court erred by allowing evidence regarding the circumstances under which the images were produced. As is clear from the above discussion, we agree with this contention. It does not, however, provide a basis for reversal. Because we are conducting *de novo* review, our conclusion that the images at issue here constitute child pornography was arrived at independently of and without deference to the trial court's decision. We did not consider evidence external to the images in reaching this conclusion. It is well settled that we may affirm on any basis apparent in the record. *People v. Braggs,* 209 Ill. 2d 492, 519 (2003).

Finally, defendant also contends that his sentence is excessive. The propriety of a sentence is a matter lying within the discretion of the trial court, and we will not interfere with that discretion unless it is abused. *People v. Roberts,* 338 Ill. App. 3d 245, 251 (2003). An abuse of discretion occurs where no

reasonable person could agree with the position taken by the trial court. *People v. Allen,* 351 Ill. App. 3d 599, 605 (2004). Indeed, a trial court, as it has the opportunity to observe a defendant and hear evidence firsthand, is in the best position to take into account such things as the defendant's character, demeanor, credibility, social environment, and habits therefore, the trial court has wide latitude in imposing a sentence so long as it does not ignore relevant mitigating evidence or consider improper factors in aggravation. *People v. Bilski,* 333 Ill. App. 3d 808, 819 (2002). A court of review, then, may not simply reweigh the evidence and substitute its judgment for that of the trial court. *People v. Streit,* 142 Ill. 2d 13, 19 (1991). Where mitigating evidence has been presented, the trial court is presumed to have considered it. *People v. Dominguez,* 255 Ill. App. 3d 995, 1004 (1994).

Defendant asserts that he is not simply asking this court to reweigh the evidence that the trial court considered; however, a reading of his argument reveals that that is exactly what defendant is doing. Defendant contends that his sentence is excessive because: (1) he has no criminal background; (2) he was sexually abused as a child; (3) he was a poor student who went on to become a successful businessman; (4) a psychologist and a doctor who specializes in treating sex offenders opined that he was a low risk to reoffend and a good candidate for a community-based plan; (5) the sentence will create an undue hardship for his five children, who depend on his income and support; (6) he has a good general

character and attitude; and (7) he has been sober for over 16 years and is an active participant in Alcoholics Anonymous, where he has helped other people. After setting forth these points, defendant simply argues that "it defies logic that this defendant has never touched anyone improperly (*i.e.*, did not commit an Aggravated Criminal Sexual Abuse, which is probational) and failed to get the minimum four-year sentence." Defendant is, in essence, asking us to reconsider the evidence presented to the trial court (and, perhaps, to conduct a cross-comparison analysis with the crime of aggravated criminal sexual abuse (720 ILCS 5/12-16 (West 2004)); however, such an argument is no longer viable in light of *People v. Sharpe,* 216 Ill. 2d 481 (2005)).

In addition to asking us to do something we cannot, that is, reweigh the evidence, defendant's argument ignores several aggravating factors upon which the trial court relied. Notably, defendant fails to mention the trial court's finding that defendant's conduct threatened serious emotional harm to others and that a need existed to deter defendant and other people from engaging in the conduct in which defendant engaged. Thus, contrary to the implication of defendant's argument, not all considerations militated for a minimum sentence.

Indeed, the trial court expressly relied upon numerous considerations. It began its ruling by stating that it had considered all of the evidence as well as the factual basis for the pleas defendant entered on the unlawful videotaping counts. It stated

that it considered the presentence investigation and the reports provided by the psychologist and the doctor who specializes in treating sex offenders. The trial court acknowledged the financial impact of incarceration, both on the State and on defendant's children. The court next noted defendant's childhood, including the abuse defendant suffered and educational difficulties he experienced. It then credited defendant with relieving people of the burden of testifying by pleading guilty on the unlawful videotaping counts, and it noted that this indicated an acceptance of responsibility. The court observed that defendant cared for and supported his children. Additionally, the court stated that it considered defendant's "industry in putting together a business." Finally, the court noted defendant's lack of a criminal history. In aggravation, the court first found that defendant's behavior threatened serious emotional harm to others. It also expressly cited the need for deterrence, regarding both defendant and others.

The court added that it was considering the arguments of the attorneys as to sentencing alternatives defendant's statement, in which he indicated remorse and the victim impact statements. The court noted that it had heard from people who testified that defendant is a person of integrity; that he puts his children first that he is caring and considerate and that he was helpful as a brother, insightful as a mentor, and helpful to others. The court indicated that it had read statements submitted upon defendant's

behalf as well as information received from experts on addiction.

The court then went on to note the effect defendant's actions had upon his victims.[2] It observed that the victims felt betrayed, ashamed, violated, embarrassed, and angry. Also, many testified that they had started to feel guilty, though they had done nothing wrong. The court further noted that several indicated that they felt fear and that for the rest of their lives they may always fear whether someone is filming them or watching them.

The court then again noted defendant's expression of remorse, but stated that "you certainly have a long way to go." It also noted defendant's participation in Alcoholics Anonymous. Finally, before pronouncing defendant's sentence, it reiterated that it was considering "all the factors that [it] was required to consider." The court then sentenced defendant to eight years' imprisonment.

We cannot say that no reasonable person could agree with the trial court that an eight-year sentence was appropriate. Defendant correctly points out that substantial mitigating circumstances exist. There were, however, substantial aggravating factors as well. Thus, a reasonable person could conclude that a sentence in excess of the minimum was warranted.

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[2] In addition to the babysitter discussed above, defendant's pleas of guilty to unlawful videotaping involved other victims.

Moreover, defendant could have been sentenced to up to 15 years imprisonment, so the sentence defendant received was closer to the minimum for a Class 1 felony. *See* 730 ILCS 5/5-8-1 (West 2002). Defendant was thus shown some leniency. Defendant's assertion, that he is not asking us to reweigh the evidence but simply to conclude that the trial court abused its discretion in light of all the circumstances of the offense and his personal history, is ill-founded. Making such a determination would appear to us to involve reweighing the evidence, and defendant does not explain how it would not. We therefore must reject defendant's argument.

In light of the foregoing, we hold that defendant was properly convicted and sentenced in the trial court below. The videotape defendant produced constitutes child pornography, and the sentence defendant received was not excessive. Accordingly, the judgment of the circuit court of Lake County is affirmed.

Affirmed.

HUTCHINSON and KAPALA, JJ., concur.